EXCERPTS FROM TRIAL COURT RECORD:

EXCERPT FROM FATHER'S TRIAL MEMORANDUM P.9

Father has supervening rights over third parties which he retains unless he has abdicated those rights

Holdings of the United States Supreme Court and Oregon Courts have recognized that, at a minimum, an extremely high burden is placed upon third persons to establish contact rights under any set of circumstances where the parent is fit. The father is the natural parent and has supervening rights which include the right to uninterrupted custody, absent a showing that he is unfit, abusive, neglectful, or has abandoned his children. Here, the "family-study" performed by Ed Vien, a psychologist, has failed to establish any fact which an objectively reasonable trier of fact could conclude would allow the grandparents custody or Miller visitation over father's reasoned objections. For these reasons alone, the father is entitled to custody and the court should deny the grandparents Motion and dismiss Mr. Miller's Motion outright.

Transcript Vol 6 (May 18, 2000 trial court hearing) By father's trial counsel, Mr. Kehoe

"...Dr. Vien relies, in large part, on hearsay from people and doesn't do anything independent to further corroborate or prove or disprove anything, and even in the end, the best he can do is to try to tell you that he thinks something might happening the future. You know, it may result; there may be a problem, but he is not telling you my client is unfit. Until he tells you that, Judge, its's our contention that we don't even get to the best interests threshold. We don't even get to the constitutional issues. My client is the dad. He is not on a level footing with

these grandparents or Mr. Miller. He is the guy who had the right to say where his kids go absent a revocation of those rights.

THE COURT: Mr. Kehoe, is that not what the Sleeper court said?

MR. KEHOE: That is what I am arguing. Sleeper, at 511, is clear that unless he does something like that, he has got that supervening right as a dad, and there are a number of states out there that don't even have a grandparents' visitation statute. Ten to one it has been declared unconstitutional. There are a multitude of states that say, "Wait a minute. Since when do we change the nature of relationships where parents" -- they advocate their constitutional right to determine the social contacts of their children with third parties."

FATHER'S BRIEF ON THE MERITS TO THE OREGON SUPREME COURT

(Excerpt from pp. 13,14)

* * * * *

Current ORS 109.119 (4) (b) allows rebuttal of the *Troxel* presumption in custodial disputes either by a showing that the parent is unwilling or unable to care adequately for the child or that the child will be harmed if custody is awarded to the parent.

* * * * *

(Excerpt from p. 34)

Standing alone, the rebuttal factors at current ORS 109.0119 (4) (b) (B) (D) and (E)... become important where a relevant relationship is demonstrated between these rebuttal

factors and either the inability of the parent to adequately care for the child or where the child has been abandoned with a third party who has established a child-parent relationship and the child would be harmed if custody were suddenly and unexpectedly transferred to the legal parent.

* * * * *

(Excerpt from p. 58)

Because Grandparents have failed to establish any *nexus* between Father's purported bad faith or his alleged "25 lies" and any resultant in harm to the children, and because the record demonstrates that Father is capable of adequately caring for and loving his children and that Father presents absolutely no present or remote threat of harm to his children, Grandparents' case must fail.

* * * * *

FATHER'S PETITION FOR RECONSIDERATION BEFORE THE OREGON SUPREME COURT

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* * * * *

(Excerpt from pp. 13,14)

***Troxel* Instructs How the Rebuttal Factors and Evidence Supporting Those Factors are to be Weighed.**

First, this 50-state survey indicates that either a showing of unfitness OR exceptional or extraordinary circumstances detrimental to the child's interest will rebut the *Troxel* presumption. See Father's Brief of the Merits at p.41.

* * * * *

(Excerpt from p.15)

This, of course, is not to suggest that a finding of parental fitness necessarily concludes the matter. A showing of "detrimental circumstances" which includes some quantum of harm less than "present risk of serious harm", together with an adequate showing of other rebuttal factors at current ORS 109.119 (4) (b) (B-E), may suffice to overcome the presumption that the parent acts in his children's best interests. However, *Troxel* and other US Supreme Court decisions instruct us that such a "safety valve" rebuttal showing will not normally be made. *Troxel, supra*, 530 US at 68. Only in the most "extraordinary or exceptional circumstances" — circumstances not present in this case — may such a rebuttal showing be made consistent with substantive Due Process.

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(Excerpt from p. 17)

The Risk of Erroneous Deprivation by Use of the Standard of "Serious Present Risk of Harm" and a Simple Totality of Evidence Test

* * * * *

(Excerpt from p.18)

In certain circumstances, not present in this case, the remaining, non-exclusive rebuttal factors at current ORS 109.119 (4) (b) (B)-(E), plus other factors not enumerated, might preponderate to rebut the *Troxel* presumption. This Court's opinion develops a simple "consider[ation] of all the evidence" test — "whether the evidence as a whole is sufficient to overcome the presumption, to justify awarding custody to grandparents." Slip op at 32,46 (emphasis added)

With respect, the decision's "totality of evidence" test does not pass the federal Due Process muster. To do so, the "dominant opinion" in the Nation, which is given a strong Due Process presumption of validity, must be heeded. That "dominant opinion" tells us that if a parent is found to be fit, in order to rebut the parental presumption, the evidence of other non-exclusive rebuttal factors must preponderate to show a totality of "extraordinary or exceptional circumstances." Such a showing will minimize the risk of erroneous deprivation to both parent and child, especially where you have a fit, custodial parent.